

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 62 of 1999

with

Civil Application No. 813 of 1999.

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO
- 1 - 5 : No

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LILABEN JASWANTRAI JOSHI

Versus

LABHUBHAI KESHAVALAL JOSHI

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Appearance:

MR MIHIR H JOSHI for appellants

MR DG CHAUHAN for Respondents

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CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 26/07/1999

ORAL JUDGEMENT

1. Admitted. Mr. D.G. Chauhan, learned advocate waives service of notice of admission on behalf of respondents. At the request of the learned advocates for the parties, this Appeal from Order is taken up for final hearing today.

2. Original defendants, being aggrieved and dissatisfied by the order of ad-interim injunction

recorded on 24.12.1998 below notice of motion in Civil Suit No.4248 of 1997 by learned City Civil Judge, Ahmedabad, in favour of the original plaintiffs, have preferred this Appeal from Order under Order 43 Rule 1 of the Civil Procedure Code (hereinafter referred to as 'the Code' for short) mounting challenge to the said order. By the said order, the learned trial Judge has granted ad-interim relief in terms of para 6 (1) of the notice of motion and thereby restrained the defendants from alienating by way of sale, gift, mortgage or any other mode of transfer the bungalow No.11 with the land admeasuring 1244 sq.yds. in T.P. Scheme No.3 of Final Plot No. 151 and 157 of Sattar Taluka Co-operative Housing Society (hereinafter referred to as 'the suit property').

Present appellants are original defendants whereas respondents are original plaintiffs and for the sake of convenience and brevity, the parties are hereinafter referred to as 'the plaintiffs' and 'the defendants'.

3. The suit in question was filed by deceased plaintiff Shardaben alleging that she was the sister of Late Shri Jashvantrai, that is, husband of appellant No.1 and father of appellant No.2, who inherited the disputed property from their father, Harishanker, who died in the year 1956, by virtue of dissolution of partnership firm. It was further averred that the suit property was of the partnership firm run in the name and style of M/s. H.V. Joshi and on dissolution of the said partnership firm and on the basis of arbitration award, while dividing the assets and liabilities of the partnership firm, the said property came to the share of late Shri Jashvantrai. Though by the said two documents the suit property is shown to be in the name of Jashvantrai, originally this property was belonged to their father, Harishanker, and, therefore, as per the provisions of Hindu Succession Act, she being the heir falling in Class I of the First Schedule, she is entitled to 1/2 share in the property. On the aforesaid premise, the suit was filed by the plaintiffs claiming 1/2 share in the property.

3.1. Along with the suit, application - notice of motion - was also moved and in the said notice of motion, ad-interim relief was claimed. Defendants appeared and contested the application - notice of motion- by filing written statement.

3.2. The learned trial Judge, after hearing the learned advocates for the parties and after appreciating

and evaluating the evidence adduced and produced before her, came to the conclusion that, prima facie, the suit property stood in the name of Ratnaben, that is, mother of Harishanker Vajeram and Hariram Vajeram. Harishanker Vajeram and Hariram Vajeram constituted the partnership firm M/s. H.V. Joshi. After the death of both of them, the said firm was continued by the sons of both of them i.e., on one hand Mahendrabhai and Deepakbhai and on the other hand Jashvantrai. Admittedly, the deceased plaintiff Shardaben was the sister of deceased Jashvantrai, who was the husband of defendant No.1. Therefore, to avoid multiplicity of proceedings and future litigations against third party, defendants were restrained from transferring and selling or alienating the suit property pendent lite the suit. It is this finding and order of the learned trial Judge which is impugned before this Court.

4. Learned advocate Mr. Mihir Joshi for the appellants and learned advocate Mr. D.G. Chauhan for the respondents have made their submissions.

5. Following are the undisputed facts which are incapable of being disputed:

- a) The plaintiff - Shardaben was the sister of deceased Jashvantrai who died during the pendency of the suit and her heirs are brought on record.
- b) In the partnership firm constituted in the name and style of M/s. H.V. Joshi by Hariram Vajeram and Harishanker Vajeram, they each had 50% share.
- c) The suit property was purchased in the name of Ratnaben, mother of both the partners of the partnership firm and construction was also put up.
- d) Hariram Vajeram died in the year 1952 whereas Harishanker Vajeram died in the year 1956. Therefore, partnership firm was reconstituted and from the side of Hariram Vajeram, Mahendrabhai and Deepakbhai whereas from the side of Harishanker Vajeram, Jashvantrai joined the partnership firm.
- e) After that the suit property stood in the name of Mahendrabhai and Jashvantrai.
- f) By virtue of the arbitration award dated 8.6.1963, the said partnership firm was dissolved

vide dissolution deed dated 27.8.1963 and the suit property went to the share of Jashvantrai as the partner of the dissolved firm.

g) Jashvantrai also died in the year 1994 leaving behind his heirs - his wife and son, that is, original defendants. By virtue of heirship the suit property stood in their name.

h) They decided to sell the property and for obtaining title clearance in respect of the suit property, notice was issued and the plaintiffs have claimed the share for the first time by notice dated 10.2.1997.

i) The suit was filed on 11.11.1997.

6. Learned advocate Mr. Joshi, referring to the aforesaid undisputed facts, has contended that prior to issuance of notice dated 10.2.1997 by the plaintiffs, defendants had entered into a registered agreement with M/s. Shailee Apartments Association and Suhani Non-trading Corporation to sell the suit property to them in consideration of Rs.1.25 crores and has also received substantial amount of Rs.62.50 lakhs from the said transaction. He further contended that out of the amount received from the said transaction, the defendants have purchased two flats bearing flat Nos.2 and 6, in Shilindhra Apartments, situated at Sardar Patel Colony, Ahmedabad. He further submitted that the approximate price of the said flats is more than Rs.44 lakhs. He further submitted that by virtue of the injunction granted by the learned trial Judge, his deal with M/s. Shailee Apartments Association and Suhani Non-trading Corporation is stalled and in this circumstance the defendants have to face multiplicity of proceedings and they have to pay back the amount which they have received by virtue of agreement which would be impossible for them as they have invested major portion of the amount for the purchase of the two flats. He further submitted that during the pendency of the suit, defendants shall not dispose of the two flats worth Rs.44 lakhs purchased by them and they shall also furnish security to the remaining amount, that is, Rs.18 lakhs (Rs.44 lakhs being the value of the flats + Rs.18 lakhs security), thus, in all Rs.62 lakhs which is equivalent to the extent of the alleged share that may come to the plaintiffs in the suit property. Mr. Joshi lastly submitted that in these circumstances, without entering into the merits of the case, the ad-interim injunction granted by the learned trial Judge may be suitable modified so that equity can

be tilted in favour of both the parties.

7. Learned advocate Mr. D.G. Chauhan initially objected to the said submissions of Mr. Joshi and he reiterated that the order recorded by the trial court does not require any interference. Alternatively, he has submitted that if the defendants intend to execute the sale deed, they may be ordered to deposit 50% of the amount received therefrom so that the plaintiffs' interest can be safeguarded and to that extent the impugned order may be modified. He further submitted that if the defendants have invested Rs.44 lakhs approximately in purchasing of two flats out of Rs.62.50 lakhs which they have received, half of the amount of the balance amount, that is, balance between Rs.62.50 lakhs and Rs.1.25 crores which they are going to receive, may be ordered to be deposited in the court over and above by creating charge upon two flats and in that case only the equity can be tilted in favour of both the parties.

8. After having given anxious considerate thought to the rival contentions of the learned advocates for both the parties, I am of the opinion that there is considerable force in the submissions advanced by learned advocate Mr. Joshi for the following reasons:

- i) It is true that defendants have entered into an agreement dated 23.8.1996 to sell the suit property with M/s.Shailee Apartments Association and Suhani Non-trading Corporation in consideration of Rs.1.25 crores.
- ii) By virtue of the said agreement to sell, the defendants have also received Rs.62.60 lakhs.
- iii) It also appears and reveals from the affidavit in reply, allotment letter and no due certificate issued by the builder of Shilindhra Apartments that the defendants have purchased two flats bearing Nos.2 and 6 of Shilindhra Apartments situated at Sardar Patel Colony, Naranpura, Ahmedabad and the value of the property runs into approximately Rs.40 lakhs. As per the affidavit, the defendants have paid more than Rs.4 lakhs for the purpose of carrying out some additional work. Therefore, towards the price of the two flats, the defendants have paid total Rs.44 lakhs which they have paid from the amount of Rs.62.50 lakhs received from the earnest money against the agreement to sell the suit property.

iv) If the injunction is allowed to remain operative till disposal of the suit which admittedly would take pretty long time the defendants' deal would be frustrated as the defendants would not be able to repay the amount nor they would be able to execute the sale deed in favour of the purchaser of the suit property which would be unavoidable situation.

9. Considering all the aforesaid aspects, without expressing any opinion about the merits of the case and rights of the parties as to the suit property being ancestral property, if the defendants are directed to file an undertaking not to dispose of the two flats situated at Shilindhra Apartments and to furnish bank guarantee of any nationalized bank in the sum of Rs.18 lakhs in favour of the plaintiffs till the disposal of the suit, I think it would meet the ends of justice and in that case the equity would be tilted in favour of both the parties.

10. In the result, the Appeal from Order succeeds in part and accordingly it is partly allowed with no order as to costs. The ad-interim injunction granted by the learned trial Judge restraining the appellants/ original defendants from transferring, alienating or mortgaging the suit property is hereby modified. It is ordered and directed that the appellants shall not alienate, encumber or transfer, wholly or any part of the property, i.e., flat Nos.2 and 6 of Shilindhra Apartments, situated at Sardar Patel Colony, Navrangpura, Ahmedabad, and shall also furnish bank guarantee of any nationalized bank in favour of the plaintiffs in the sum of Rs.18 lakhs till the hearing and final disposal of the suit. Both the appellants shall file an undertaking to these effect in this court within a period of one week hereof and only on such undertaking being filed, the appellants are permitted to execute the sale deed on the basis of the agreement to sell which they have entered into with M/s. Shailee Apartments Association and Suhani Non-trading Corporation. The ad-interim relief granted by the learned trial Judge is modified to the aforesaid extent only.

11. It would be open for both the parties to seek appropriate orders for expeditious hearing of the suit by filing appropriate application before the trial Court and if such an application is filed, it is hoped that the learned trial Judge would consider the same sympathetically consistent with his or her calendar.

12. In view of the order passed in the Appeal from Order, there shall be no order on the civil application. Notice is discharged.

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